No. 12,460

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT NELSON LANTIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

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JURISDICTION.

Section 3231 of Title 18, United States Code, confers jurisdiction upon the Court below; and Sections 1291 and 1294 of Title 28, United States Code, grant appellate jurisdiction to this Honorable Court.

STATEMENT OF THE CASE.

On March 23, 1949, the Grand Jury for the United States District Court for the District of Hawaii returned an indictment in two counts, charging Robert Nelson Lantis, the defendant and appellant herein,

who is a non-veteran, in Count I with having conspired during November 1946 with one Oliver Abreu, a veteran, to violate "Section 80, Title 18, United States Code, by making and causing to be made, presenting and causing to be presented, to and in a matter within the jurisdiction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent application, statement, certificate, and representation" in connection with the unlawful purchase of a surplus vehicle, a jeep. It is alleged in the indictment that the said application and statement was false in that Oliver Abreu represented he was purchasing the jeep for his own use and not for resale, whereas he was in fact purchasing it for the sole use and benefit of the defendant. In Count II of the indictment, the defendant is charged with having caused the said Oliver Abreu to commit one of the substantive offenses, namely the filing of the said false statement with knowledge that the statement was false (R. 2-5.) Oliver Abreu testified repeatedly that he purchased the vehicle at the defendant's request, that he purchased it for the defendant and not for himself, and that the defendant did not lend him the money with which the purchase was made (R. 37, 38, 42, 46, 57-61, 69).

With reference to the testimony of the defendant, the attention of this Court is called to the fact that while he testified the subject vehicle had a value of approximately $150.00 (R. 83), he was unable to remember to whom he had sold it or for how much

(R. 92-93). It must be borne in mind that the defendant had a U-Drive business and that he used jeeps in this business (R. 43). Furthermore, the defendant testified that a certain Veteran's Purchase Order, Plaintiff's Exhibit No. 2, which was used in connection with the purchase of the jeep, had been "all filled out" and brought to the defendant by Abreu (R. 81), while Abreu and another witness, Anthony W. Cambra, testified the defendant had supplied that form and that it was not filled out (R. 41, 108).

The appellee does not controvert the remainder of the statement of the case set forth in the brief for appellant which limits the issue in the appeal to the question of whether the evidence is sufficient as a matter of law to sustain either count in the indictment.

SUMMARY OF ARGUMENT.

There was ample evidence adduced at the trial of this case before the United States District Court for the District of Hawaii to sustain the defendant's conviction as to each count of the indictment.

The appellee does not disagree with the appellant's statement (Brief for Appellant, p. 4) that to convict a defendant of a conspiracy involving only two conspirators, both must have the requisite knowledge and intent, but it is not necessary that the conspirators should have knowledge of the specific statute defining the substantive offense but only that they should have knowledge of the object of the con-

spiracy, in this case the submission of a false statement for the purchase of a surplus jeep and the unlawful purchase of that jeep.

The appellee concurs with the appellant's statement that to have a violation of Section 80, Title 18, United States Code, it is not only necessary that a false statement be filed with the Government or a department or agency thereof, but it is also essential that the person filing the statement knew that it was false. It is submitted that there was more than ample proof upon which the trial court necessarily found that both Abreu and the defendant knew the statements filed by Abreu were false.

To have a conspiracy, a corrupt motive or intent is not required if there is an intent on the part of the conspirators to do or to have done an act or acts which are a statutory crime or in violation of the law, however, there was adequate evidence of corrupt intent on the part of both Abreu and the defendant adduced at the trial of this case.

ARGUMENT.

I. THE EVIDENCE ADDUCED AT THE TRIAL OF THIS CASE SUSTAINS THE DEFENDANT'S CONVICTION ON BOTH COUNTS OF THE INDICTMENT.

A conspiracy has been defined by the courts many times as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone*

v. United States, 148 U.S. 197, 203 (1893); *Marino v. United States,* 91 F. (2d) 691, 693 (1937, C.C.A. 9th), certiorari denied, 302 U.S. 764. A formal agreement is not necessary and it is sufficient that the minds of the parties met understandingly so as to bring about an independent and deliberate agreement, and even a mutual implied understanding is sufficient. *Marx v. United States,* 86 F. (2d) 245, 250 (1936, C.C.A. 8th); *Hyde v. United States,* 225 U.S. 347, 376 (1912). Act of March 4, 1909, c. 324, § 37, 35 Stat. 1096 (18 U.S.C. 88), which makes a conspiracy to commit an offense against the United States a penal violation, includes conspiracies to violate regulations authorized by law. *United States v. Von Clemm,* 136 F. (2d) 968 (1943, C.C.A. 2nd), certiorari denied, 320 U.S. 769; *United States v. Kertess,* 139 F. (2d) 923 (1944, C.C.A. 2nd), certiorari denied, 321 U.S. 795. The statute adds to the common law crime of conspiracy in so far as it requires that one or more of the parties must do an act to effect the object of the conspiracy which act must be both averred and proven. *Hyde v. United States,* supra, at 359; *Bannon v. United States,* 156 U.S. 464, 468 (1895). The overt act done to effect the object of the conspiracy may be that of only a single one of the conspirators and it need not appear that the others expressly join in it nor need it be a criminal act of itself. *Braverman v. United States,* 317 U.S. 49, 53 (1942); *United States v. Rabinowich,* 238 U.S. 78, 86 (1915). The exact date of formation of the conspiracy does not have to be set out, and if alleged, need not be proven as laid, but it is sufficient if

shown to have existed prior to the commission of the overt act and to continue to exist at that time. *Bradford v. United States,* 152 Fed. 617, 619 (1907, C.C.A. 5th), certiorari denied, 206 U.S. 563; *Pearlman v. United States,* 20 F. (2d) 113, 114 (1927, C.C.A. 9th), certiorari denied, 276 U.S. 549.

Intent is a necessary element of the crime of conspiracy. *Frohwerk v. United States,* 249 U.S. 204, 209 (1919); *Wong Tai v. United States,* 273 U.S. 77, 81 (1927); *Mazurosky v. United States,* 100 F. (2d) 958, 962 (1939, C.C.A. 9th). This must be an intent to commit every element of the substantive offense which is the object of the conspiracy. *United States v. Mack,* 112 F. (2d) 290, 292 (1940, C.C.A. 2nd); *Chadwick v. United States,* 141 Fed. 225, 243 (1905, C.C.A. 6th).

The evidence adduced at the trial of this case amply proves the essential elements of a violation of Act of March 4, 1909, c. 324, § 37, 35 Stat. 1096 (18 U.S.C. 88), outlined above. In Count I of the indictment, the commission of two offenses against the laws of the United States is set out as the object of the conspiracy: first, the making of a false statement in violation of Section 80, Title 18, United States Code; and second, the purchase under veteran's priority of a surplus vehicle for the defendant, which was in violation of Section 1625, Title 50, Appendix, United States Code, and the regulations promulgated thereunder. Proof of conspiracy to do acts violative of one statute is sufficient. *Kepl v. United States,* 299 Fed. 590, 591 (1924, C.C.A. 9th), certiorari denied, 266 U.S. 617; *United States v. Smith,* 112 F. (2d) 83, 86

(1940, C.C.A. 2nd). Abreu testified to the agreement between himself and the defendant pursuant to which Abreu was to make a purchase of a surplus vehicle for the defendant (R. 37-38).

There is also evidence that Abreu knew the statements which were submitted to the Territorial Surplus Property Office were false, and that the defendant, who assisted in their preparation, knew they were false, and that they agreed and planned with each other to submit such false statements which were submitted by them, in concert. Though knowledge by the defendant that the purchase of the surplus jeep for him by Abreu under veteran's priority was unlawful need not have been proven, there is evidence in the record that the defendant had such knowledge, for why else would he have asked Abreu to make the purchase if he could have made it lawfully himself? Although it must be proven that the defendant knew the object of the conspiracy, namely, the making of false statements and/or the purchase under veteran's priority of a surplus vehicle by Abreu for him (*Marino v. United States, supra,* at 696), knowledge that such object is unlawful need not be proven but will be presumed *Chadwick v. United States, supra,* at 243; *Cruz v. United States,* 106 F. (2d) 828, 830 (1939, C.C.A. 10th).

Each of the overt acts alleged in the indictment were proven. Abreu testified to the first alleged overt act (R. 40-41, U.S. Exhibit No. 2), as did Cambra (R. 101-106). Abreu testified to the second alleged overt act (R. 40-41, U.S. Exhibit No. 2) and also to

the third alleged overt act (R. 43-44-45-59, U.S. Exhibit No. 3).

The record is replete with evidence that in effecting the object of the conspiracy, Abreu did file false statements with the Territorial Surplus Property Office. Pursuant to his agreement with the defendant, Abreu filed an application for surplus property, U.S. Exhibit No. 1, in which he stated that such property as he might be permitted to purchase under that application would be purchased for his "personal use". On or about November 18, 1946, he signed a certificate that he was not "acting as an agent for others" and that he was not purchasing the surplus jeep "for resale" (U.S. Exhibit No. 3), whereas, as he and the defendant then and there well knew, he was in fact purchasing this jeep for the defendant (R. 42-45-46-57-61, 69).

It is respectfully submitted that the evidence was sufficient to sustain the defendant's conviction on both counts of the indictment.

II. NEITHER KNOWLEDGE OF THE STATUTE DEFINING THE SUBSTANTIVE UNLAWFUL ACTS NOR KNOWLEDGE THAT THE OBJECT OF THE CONSPIRACY IS UNLAWFUL IS AN ESSENTIAL ELEMENT OF A CONSPIRACY.

In urging that the evidence is insufficient as a matter of law to sustain the first count in the indictment, the appellant argues that "there is no proof that either of the alleged conspirators knew of the existence of" Section 80, Title 18, United States Code (Appellant's Brief, p. 10). In support of this, they

recite Abreu's statement that he "didn't know" the purchase of the jeep might be in violation of the law (R. 46). In the instant case, it was not required that the Government prove that one or both of the conspirators knew of the existence of the statute defining the substantive offense, namely, Act of April 4, 1938, c. 69, 52 Stat. 197 (18 U.S.C. 80), or that the conspirators knew that the filing of the false statements by Abreu was unlawful, or that the defendant and Abreu knew the purchase of the surplus jeep under veteran's priority for the defendant was in violation of the law, but only that the conspirators intended to file such false statements knowing that they were false and intended to make such purchase for the defendant. *United States v. Mack, supra; Chadwick v. United States, supra; United States v. Keegan,* 141 F. (2d) 248, 254 (1944, C.C.A. 2nd), rev'd. on other grounds, 325 U.S. 478.

Ordinarily, knowledge that the object of a conspiracy is unlawful or fraudulent will be presumed (*Chadwick v. United States, supra,* at 243), and "even where the substantive offense is merely *mala prohibita*" if "a corrupt motive is established such knowledge is imputed." *Cruz v. United States, supra;* 15 C.J.S. 1066. In this connection, some of the Courts have drawn a distinction between a substantive offense which is *mala in se* and one which is *mala prohibita. Landen v. United States,* 299 F. (2d) 75, 78, 79 (1924, C.C.A. 6th); *Commonwealth v. Benesch,* 290 Mass. 125 (1935); *People v. Powell,* 63 N.Y. 88 (1875). It is to be noted that in most of the cases cited by appellant in support of his argument that the Government

is required to prove either a knowledge of the violated statute or a knowledge that the contemplated acts were unlawful or corrupt on the part of the conspirators, the objects of the alleged conspiracies were merely *mala prohibita,* or no corrupt motive was charged in the indictment. The prevailing rule of law followed by the courts of the United States seems to be that the Government need not prove knowledge on the part of a conspirator that the object of the conspiracy is unlawful. *Hamburg-American Steam Packet Co. v. United States,* 250 Fed. 747 (1918, C.C.A. 2nd); *United States v. Mack, supra,* at 292; *Blumenthal v. United States,* 88 F. (2d) 522, 540 (1937, C.C.A. 8th); *Cruz v. United States, supra; United States v. Keegan, supra,* at 254. This principle adopted by these courts is in line with the doctrine on which our entire system of criminal jurisprudence rests, that ignorance of penal laws is no defense to indictment for their violation. Wharton's Criminal Law, Vol. I, Sec. 102.

In the instant case, the purchase of the surplus jeep under veteran's priority for the defendant was *mala prohibita* and under the *Cruz* and *Keegan* cases, knowledge that it was unlawful could be presumed, but there is evidence in the record that the defendant knew this or he would not have searched out a veteran and asked the veteran to make the purchase for him. On the other hand, the making of the false statement, which constituted an integral part of the unlawful purchase, was corrupt in itself and *mala in se,* and knowledge that it was in violation of the law was properly imputed. It is also to be noted that the fraudulent or corrupt nature of the plan or con-

spiracy may be inferred from a series of isolated acts. *Deaver v. United States,* 155 F. (2d) 740, 744 (1946, App. D.C.), certiorari denied, 329 U.S. 766.

In the case of *United States v. Keegan, supra,* the appellants had been charged with conspiring to counsel divers persons to evade, resist and refuse service in the armed forces of the United States in violation of Section 11 of the Selective Training and Service Act of 1940. In their defense, it had been argued that they were merely endeavoring to bring a test case to determine the constitutionality of another section of the Selective Training and Service Act of 1940, that they lacked a corrupt motive, and consequently were not guilty of violating the conspiracy statute. The trial judge instructed the jury that this was no defense, stating that "if there was a conspiracy amongst these defendants or any of them having as its object the violation of the Selective Service law, knowingly, the reason of such violation is immaterial to you in your consideration of the question of their guilt or innocence." This instruction was cited by the appellants as error. Judge Augustus N. Hand, speaking for the Second Circuit held "that to establish violation of the statute, nothing more has to be proven than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit."

The Supreme Court, in a 5 to 4 decision, reversed the judgment in the *Keegan* case on *other grounds* but Chief Justice Stone in his dissenting opinion states as follows (*Keegan v. United States,* 325 U.S. 478, 504 (1945)):

The doctrine of *People v. Powell,* 63 N.Y. 88, on which petitioners rely, that a criminal conspiracy to do an act "innocent in itself" not known by the conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy, has never been accepted by this Court. To establish violation of § 11 nothing more need be proved than that respondents had in contemplation all the elements of the offense which they conspired to commit. *United States v. Mack,* 112 F.2d 290, 292; cf. *Hamburg-American Steam Packet Co. v. United States,* 141 F. 225, 243. There is no contention that petitioners did not know that the Selective Service Act required those subject to it to do military service. And *People v. Powell, supra,* was careful to point out that where the conspiracy is to do an act which is not "innocent in itself" the offense is "complete when the act is intentionally done," irrespective of any actual intention to violate the law. Here the act prohibited was hardly "innocent in itself." The facts found by the jury under instructions of the court constitute plain violation of § 11, and the jury's verdict is supported by the evidence.

III. THERE WAS ADEQUATE EVIDENCE THAT BOTH THE DEFENDANT AND ABREU KNEW THE STATEMENTS FILED BY AND FOR ABREU WITH THE TERRITORIAL SURPLUS PROPERTY OFFICE WERE FALSE.

The statements filed by Abreu (U.S. Exhibit Nos. 1, 2 and 3) with the assistance of the defendant and with full knowledge of their contents on his part were false assertions of existing intent and promise and

constitute violations of Section 80, Title 18, United States Code. *United States v. Uram,* 148 F. (2d) 187, 189 (1945, C.C.A. 2nd). The testimony of Abreu reveals beyond a reasonable doubt that he, as well as the defendant, knew those statements and representations to be false (R. 42, 44, 45, 46, 57-61, 69). There was adequate basis for the trial court's finding that Abreu had read and knew the contents of both United States Exhibits Nos. 1 and 3 prior to their filing, and that the defendant knew the contents of United States Exhibits Nos. 1, 2 and 3 prior to their filing.

CONCLUSION.

It is respectfully submitted that the trial court did not err in any matter brought before it in the trial of this case, and that the judgment of that court should be affirmed.

Dated, Honolulu, T. H., this 19th day of June, 1950.

Respectfully submitted,

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